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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 61

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, ET AL., PETITIONERS,

vs.

CENTRAL AIRLINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 10, 1962
CERTIORARI GRANTED FEBRUARY 26, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 656

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, ET AL., PETITIONERS,

vs.

CENTRAL AIRLINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH, TEXAS

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS and E. E. FUQUA, Plaintiffs,

versus

CENTRAL AIRLINES, INC., Defendant.

No. 4220-Civil.

ORIGINAL COMPLAINT—Filed November 30, 1959

To the Honorable Judge of the United States District Court:

Now come International Association of Machinists, AFL-CIO, R. K. Doud, S. V. Cornstubble, O. L. Broom, C. R. Casey, P. R. Davis and E. E. Fuqua, plaintiffs, complaining of Central Airlines, Inc., and for cause of action respectfully show the following:

[fol. 2]

1.

Plaintiff International Association of Machinists, AFL-CIO, a voluntary association, is a labor organization; it maintains its principal office at Washington, D. C. and also maintains an office at 3409 Cedar Springs Road, Dallas, Texas. Said plaintiff is a "representative" within the definition of the Railway Labor Act [45 U. S. Code § 151 Sixth], designated by employees of carriers among others, to act for them in collective bargaining.

2.

Plaintiffs R. K. Doud, S. V. Cornstubble, O. L. Broom, C. R. Casey, P. R. Davis and E. E. Fuqua are individual employees of defendant Central Airlines, whose services

were terminated by defendant on or about April 7, 1958. Each of said individual plaintiffs is a resident of Tarrant County, Texas.

3.

Defendant, hereinafter sometimes called Central, is a corporation incorporated under the laws of the State of Nevada, and doing business in various states, including the state of Texas. It maintains its principal office at Amon Carter Field, Tarrant County, Texas. Central is a common carrier by air engaged in interstate commerce within the meaning of Section 201 of the Railway Labor Act [45 U. S. Code § 181].

4.

On March 14, 1957, pursuant to an election conducted by the National Mediation Board under the Railway Labor Act, [45 U. S. Code §§ 151-163, 181-188], case number [fol. 3] R-2135, International Association of Machinists was certified as the duly designated and authorized collective bargaining representative of Central's airline mechanics and stock and stores employees.

5.

Plaintiff International Association of Machinists and Central, as required by Section 2 of the Railway Labor Act [45 U. S. Code § 152], engaged in collective bargaining and signed a collective bargaining agreement on May 7, 1957.

6.

Said plaintiff International Association, and defendant Central, in accordance with statutory requirement [45 U. S. Code § 184], established a board of adjustment of jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of Section 3, Title I of the Railway Labor Act [45 U. S. Code § 153]. Said board is known as the Central-AM System Board of Adjustment.

In agreeing to the establishment of said System Board, the parties, on May 7, 1957, adopted the system board agreement which had previously been in effect between the Air Carrier Mechanics' Association, International, and Central Airlines, a true and correct copy of which is attached hereto and made a part hereof as Exhibit A.

8.

On June 18, 1958, the System Board of Adjustment met and conducted a hearing for the purpose of considering certain grievances which had been filed by plaintiffs Doud, [fol. 4] Cornstubble, Broom, Casey, Davis and Fuqua, and which had been processed in due course through the requisite preliminary steps. The System Board at that hearing was composed of two representatives of the company and two representatives of the union. The Board deadlocked, and therefore the parties requested the National Mediation Board to appoint a neutral fifth member to break the deadlock. Whereupon, Francis J. Robertson, of Washington, D. C., was duly appointed by the National Mediation Board to serve as such Neutral Referee. The Board, consisting of the two company members, two union members and the Referee, met at the Hilton Hotel in Fort Worth, Texas, on June 29, 1959, and heard the parties to the dispute. Thereafter, briefs were filed with the Board by both parties and considered by the Board meeting in executive session.

9.

On November 3, 1959, the Neutral Referee submitted an opinion and award, which was joined in by both union members of the Board. A true and correct copy of said opinion and award is attached hereto and made a part hereof as Exhibit B. Said award, became effective immediately when signed by a majority of the Board.

10.

Plaintiffs have requested that defendant comply with said award according to its terms; however, defendant has refused and continues to refuse to comply.

11.

As a result of defendants' failure, each individual plaintiff has suffered and will stand to suffer substantial dam-
[fol. 5] ages, including loss of wages from the date of their wrongful discharge, all of which is shown in greater detail in the award attached hereto, as Exhibit B.

12.

This Honorable Court has jurisdiction of this action under 28 U. S. Code § 1331, this being a matter in controversy exceeding the sum and or value of $10,000, exclusive of interest and costs, and arises under the laws of the United States, specifically under the Railway Labor Act as set out more particularly hereinabove.

Wherefore, Premises Considered, plaintiffs respectfully pray for enforcement of the aforesaid System Board Award, Exhibit B, and that judgment be entered ordering defendant to comply with said award, and for such other relief, special or general, at law or in equity, to which defendants, and each of them may be entitled.

Respectfully submitted,

Mullinax, Wells, Morris & Mauzy, 1610 National Bankers Life Bldg., Dallas 1, Texas; By Charles J. Morris.

Plato E. Papps, Chief Counsel, Int'l Association of Machinists, 1300 Connecticut Avenue, Washington 6, D. C.

[fol. 6]

EXHIBIT A TO COMPLAINT

Agreement Between Central Airlines, Inc. and the Air Carrier Mechanics in the service of Central Airlines, Inc. as Represented by the Air Carrier Mechanics Association International, Covering the Establishment and Maintenance of a System Board of Adjustment.

It is Mutually Agreed that:

(a) 1. The term "Company" as used herein shall be construed to mean Central Airlines, Inc.

2. The term "Association" as used herein shall be construed to mean the Air Carrier Mechanics Association, International.

3. The term "Mechanics' Agreement" as used herein shall be construed to mean the Agreement between Central Airlines, Inc. and the Air Carrier Mechanics in the service of Central Airlines, Inc., dated August 28, 1955, or any extension or renewal of that Agreement.

(b) In compliance with Section 204, Title II of the Railway Labor Act, as amended, there is hereby established a system board of adjustment for the purpose of adjusting and deciding disputes which may arise under the terms of the Mechanics' Agreement and any amendments or additions thereto and which are properly submitted to it, which Board shall be known as "Central Airlines, Inc. Mechanics' System Board of Adjustment", hereinafter referred to as the "Board".

[fol. 7] (c) The Board shall consist of four members, two of whom shall be selected and appointed by the Association and two by the Company, and such appointees shall be known as "Adjustment Board Members".

(d) The four members shall serve for one year from the date of their appointment or until their successors have been duly appointed. Vacancies in the membership of the Board shall be filled in the same manner as is provided herein for the selection and appointment of the original members of the Board.

(e) The Board shall have jurisdiction over disputes between any employee covered by the Mechanics' Agreement and the Company, growing out of grievances or out of interpretation or application of any of the terms of the Mechanics' Agreement. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation, or working conditions covered by existing agreements between the parties hereto.

(f) The Board shall consider any dispute properly submitted to it by the President of the Association or by the Vice-President of Operations of the Company when such

dispute has not been previously settled in accordance with terms provided for in the Mechanics' Agreement. No matter shall be considered by the Board which has not first been handled in accordance with the appeals provisions of the Mechanics' Agreement, including the rendering of a decision thereon.

(g) Appointments of members of the Board shall be made by the respective parties within thirty (30) days from [fol. 8] the date of the signing of this Agreement and said appointees shall meet in the City of Fort Worth, Texas, within forty-five (45) days from the date of the signing of this Agreemen., and shall organize and select a Chairman and Vice-Chairman, both of whom shall be members of the Board. The term of office of Chairman and Vice-Chairman shall be one year. Thereafter, the Board shall designate one of its members to act as Chairman and one to act as Vice-Chairman for one-year terms. Each officer so selected shall serve for one year or until his successor has been duly selected.

The office of Chairman shall be filled and held alternately by an Association member of the Board and by a Company member of the Board. When an Association member is Chairman, a Company member shall be Vice-Chairman, and vice versa. The Chairman, or in his absence the Vice-Chairman, shall preside at meetings of the Board and at hearings and shall have a vote in connection with all actions taken by the board.

After the organization meeting referred to herein, the Board shall thereafter meet in the city where the general offices of Central Airlines, Inc. are maintained (unless a different place of meeting is agreed upon by the Board) during the first week in October and the first week in April of each year, provided that at such times there are cases filed with the Board for consideration, and shall continue in session until all matters before it have been considered, unless otherwise mutually agreed upon.

(h) All disputes properly referred to the Board for consideration, shall be addressed to the Chairman. Five copies of each petition, including all papers and exhibits in con- [fol. 9] nection therewith, shall be forwarded to the Chair-

man, who shall promptly transmit one copy thereof to each member of the Board. Each case submitted shall show:

1. Question or questions at issue.
2. Statement of facts.
3. Position of employee or employees.
4. Position of Company.

When possible, joint submissions should be made, but if the parties are unable to agree upon a joint submission, then either party may submit the dispute and its position to the Board.

(i) Upon receipt of notice of the submission of a dispute, the Chairman shall set a date for hearing, which shall be at the time of the next regular meeting of the Board, or, if at least two members of the Board consider the matter of sufficient urgency and importance then at such earlier date and at such place as the Chairman and Vice-Chairman shall agree upon, but not more than fifteen days after such request for meeting is made by at least two of said members, and the Chairman shall give the necessary notices in writing of such meeting to the Board members and to the parties to the dispute.

(j) Employees covered by the Mechanics' Agreement may be represented at Board hearings by such person or persons as they may choose and designate and the Company may be represented by such person or persons as it may [fol. 10] choose and designate. Evidence may be presented either orally or in writing, or both.

On request of individual members of the Board, the Board may, by a majority vote, or shall at the request of either the Association representatives or the Company representatives thereon, summon any witnesses who are employed by the Company and who may be deemed necessary by the parties to the dispute, or by either party, or by the Board itself, or by either group of representatives constituting the Board.

The number of witnesses summoned at any one time shall not be greater than the number which can be spared from

the operations without interferences with the services of the Company.

(k) A majority vote of all members of the Board shall be competent to make a decision.

(l) Decisions of the Board in all cases properly referable to it shall be final and binding upon the parties hereto.

(m) When a deadlock occurs in a case referred to the Board, it shall be the duty of the Board to endeavor to reach a decision, and, failing in this, to endeavor to agree within thirty (30) days upon a procedure for breaking such deadlock. In any case where the said System Board of Adjustment becomes deadlocked and unable to reach a decision upon a method for breaking the deadlock within the above-prescribed thirty (30) days, either the Company or the Association may petition the National Mediation Board for the appointment of a neutral referee to sit with the System Board of Adjustment, as a member thereof. Such Board of Adjustment, as then constituted, shall hear [fol. 11] the parties with reference to the dispute pending before it, and a majority vote of the Board shall be final, binding, and conclusive between the Company and the Association and anyone they may represent having an interest in the dispute. In case either the Company or the Association fails to petition the National Mediation Board within thirty (30) days after the thirty-day period prescribed in this paragraph for breaking deadlocks, the matter in question shall be deemed by all parties concerned to be ended and no action thereon shall be taken thereafter by either party.

(n) Nothing herein shall be construed to limit, restrict, or abridge the rights or privileges accorded either to the employees or to the employer, or to their duly accredited representatives, under the provisions of the Railway Labor Act, as amended, and the failure to decide a dispute under the procedure established herein shall not, therefore, serve to foreclose any subsequent rights which such law may afford or which may be established by the National Mediation Board by orders issued under such law with respect to

disputes which are not decided under the procedure established herein.

(o) The Board shall maintain a complete record of all matters submitted to it for its consideration and of all findings and decisions made by it.

(p) Each of the parties hereto will assume the compensation, travel expense, and other expenses of the Board members elected by it.

(q) Each of the parties hereto will assume the compensation, travel expense, and other expenses of the witnesses called or summoned by it. So far as space is available, [fol. 12] witnesses who are employees of the Company shall receive free transportation to the extent permitted by law. The Board will make every effort to hold its hearings and investigations at points that will best serve the purposes of satisfactorily concluding the work of the Board with the least amount of travel for the greatest number of persons attending the proceedings.

(r) The Chairman and the Vice-Chairman, acting jointly, shall have the authority to incur such other expenses as, in their judgment, may be deemed necessary for the proper conduct of the business of the Board and such expense shall be borne one-half by each of the parties hereto. Board members who are employees of the Company shall be granted necessary leaves of absence for the performance of their duties as Board members. So far as space is available, Board members shall be furnished free transportation over the line of the Company for the purpose of attending meetings of the Board, to the extent permitted by law.

(s) It is understood and agreed that each and every Board member shall be free to discharge his duty in an independent manner, without fear that his individual relations with the Company or with the employees may be affected in any manner by action taken by him in good faith in his capacity as a Board member.

(t) This Agreement shall become effective as of September 1, 1955, and shall continue in full force and effect until September 1, 1956, and shall renew itself without

change until each succeeding September 1, thereafter, unless written notice of intended change is served in accordance with Section 6, Title I, of the Railway Labor Act, as amended by either party hereto at least thirty days prior [fol. 13] to September 1, 1956, or any September 1, thereafter.

In Witness Whereof, the parties hereto have signed this Agreement this 28th day of August, 1955.

For CENTRAL AIRLINES, INC.,
(S) F. E. HOWE.

For THE AIR CARRIER MECHANICS IN THE SERVICE OF CENTRAL ARLINES, INC.,
(S.) GLYN R. JOHNS.

Witness:
(S) F. E. MANCUSO.

Witness:
(S) THOMAS L. DUNLEVY.

[fol. 14]

EXHIBIT B TO COMPLAINT

Central Airlines, Inc.—International Association

In the Matter of:

R. K. Doud, S. V. Cornstubble, O. L. Broome, C. R. Casey, P. R. Davis, and E. E. Fuqua.

Award

Grievances Nos. C-23 to C-28, C-30 to C-35 and each inclusive.

Preliminary Statement.

This proceeding comes about as a result of two separate grievances of each of six employees protesting their suspension and discharge by the Company. After progression through the grievance machinery provided for in the applicable Collective Bargaining Agreement (Agreement effective September 1, 1955 between Central Airlines and the

Air Carrier Mechanics Association International) and disallowance by the Company, the grievances were presented to the System Board of Adjustment consisting of two Company members and two Union members. After presentation of the grievances to the System Board of Adjustment as thus constituted the Board deadlocked upon the disposition of the cases and application was made to the National Mediation Board for the appointment of a neutral referee to sit as a member of the Board to break the deadlock.

Francis J. Robertson, of Washington, D. C., was duly appointed by the National Mediation Board as Neutral Referee. The Board, consisting of the two Company members, two Union Members and the Referee, met at the Hilton Hotel in Fort Worth, Texas, on June 29, 1959, and [fol. 15] heard the parties to the dispute. Thereafter, briefs were filed with the Board by both parties and considered by the Board meeting in executive session.

The following Appearances were noted:

For the Union:

Charles Morris, Esq., Dallas, Texas, Edward J. Hickey, Esq., Washington, D. C., Plato E. Papps, Esq., Mr. L. T. Faircloth, Dallas, Texas.

For the Company:

Karl Mueller, Esq., Forth Worth, Texas, Mr. R. L. Wageneck, Mr. Jack Michael.

Background of the Dispute.

At various times between 4:00 P.M. and 4:30 P.M. on Thursday, April 3, 1958 the six grievants involved in this dispute were requested to work overtime. In the case of Messrs. Doud, Fuqua, Broome and Davis it appears that the initial request was made by the shop steward. In the case of Messrs. Cornstubble and Casey it appears that the shop steward was accompanied by a crew chief when this request was made. All six of the employees refused, giving various reasons for such refusal. That same evening close to quitting time of 4:30 P.M. the crew chief delivered letters addressed jointly to Messrs. Doud, Cornstubble and Broome

to each of those men in which they were told that no one desired to work overtime and since they were the junior men in their department they were directed to work four hours overtime from 4:30 P.M. to 8:30 P.M. on April 3, 1958. Similar letters addressed jointly to Messrs. Fuqua, Casey and Davis were delivered by the crew chief to Messrs. [fol. 16] Fuqua and Casey on that same evening directing them to work four hours overtime from 4:00 A.M. to 8:00 A.M. on April 4, 1958. On Friday morning, April 4, 1958 Mr. Davis found his copy of the letter on his time card. About 8:30 P.M. on Friday, April 4, 1958, Mr. Davis was contacted on the telephone by Mr. Vaughan, Director of Maintenance. Mr. Vaughan told Mr. Davis that as the junior man in the sheet metal shop he was being requested to come in at eight o'clock the following morning, Saturday, April 5, 1958. About 10:15 or 10:30 P.M. that same Friday evening Mr. Vaughan, accompanied by Mr. Jack Michael of the Personnel Department, delivered a letter to Mr. Davis directing him to report on Saturday, April 5, 1958 to work on Aircraft 397.

No one of the six grievants complied with the directions to work overtime on either of the days involved. At various times on Friday evening, April 4, 1958 and Saturday, April 5, 1958 Mr. Vaughan, accompanied by Mr. Michael, delivered letters to each of the grievants, excepting Mr. Broome, notifying them of suspension from service and instructing them to report to the Office of the Director of Maintenance at 8:00 A.M. on Monday, April 7, 1958. Mr. Broome received the same type of letter upon reporting for work on Monday morning, April 7, 1958. These letters were all identically worded and dated April 4, 1958 with the exception of the letter to Mr. Davis, which was dated April 5, 1958. The letter read as follows:

"Dear Sir:

You were suspended from service, pending completion of the Company's investigation in respect of your failure to perform your work assignment as directed.

You are hereby instructed to report to the office of the Director of Maintenance at 8:00 o'clock A.M. on Monday, [fol. 17] April 7, 1958, for interview by the Company so

that your statement can be considered by the Company in determining what if any action is to be taken in this connection.

If the Company finds that you were not at fault, you will be returned to service and you will be made whole for any loss of pay that you may have suffered by reason of your suspension.

Yours very truly,

(S) D. S. VAUGHAN,
(D. S. Vaughan),
Director of Maintenance"

On Monday, April 7, 1958 Mr. George Neal, President of the Local Union, told Mr. Vaughan that he would appear for the grievants. Mr. Vaughan consulted with Mr. Wageneck, Vice-President Operations, and Mr. Wageneck spoke to Mr. Neal and advised him that a Union representative could not be present at the interview. Shortly thereafter, on the same morning, Mr. L. T. Faircloth, Grand Lodge Representative of the I.A.M., met with Mr. Wageneck and other Company representatives and discussed the question of the right of the individuals involved to Union representation. The Grand Lodge representative finally took the position that the men would not talk without a representative present. After Mr. Faircloth left the conference the Company representatives went down to the hangar in an apparent effort to talk to the grievants but they had already left the premises. Thereafter, on the same day, by registered mail, Mr. Wageneck forwarded a letter to each of the grievants informing them of their discharge. Except for the fact that the letter to Mr. Davis referred to his being directed to work overtime on Friday, April 4, 1958, the body [fol. 18] of the letter to each grievant was identically worded. The letter to Mr. Broome is illustrative and it read as follows:

"Mr. O. L. Broome
Star Route E, Box 351
Azie, Texas

Dear Mr. Broome:

On Thursday, April 3, 1958, you were directed to work overtime. You failed and refused to work such overtime.

"Thereafter, you were instructed to report to the office of the Director of Maintenance at 6:00 AM on Monday, April 7, 1958, 'for interview by the Company so that your statement can be considered by the Company in determining what, if any, action is to be taken in this connection.'

"While you came to the hangar at the time stated, you did not report as instructed. Instead, a representative of the International Association of Machinists informed us that he had advised you to refuse to talk to us. We then went to the hangar for the purpose of talking to you, to see whether or not you would give us a statement in respect to your failure and refusal to work overtime as directed. We found that you had left the property and we have had no word from you. We can only assume, in these circumstances, that you decided to refuse to talk to us about the matter.

"Your conduct in the premises leaves us no alternative except to terminate your services as of 10:99 AM., April 7, 1958.

Yours very truly,

S/S R. L. WAGENECK
(R. L. Wegeneck)
Vice-President, Operations"

[fol. 19] Each of the grievants filed a grievance form dated April 7, 1958 and received by the Company on April 8, 1958 each one of which read in pertinent part as follows:

"I was unjustly suspended from Central Airlines and I request that I be granted a hearing and that I be reinstated without loss of seniority and that I be made whole for all loss of pay.

"I request that this Hearing be held in accordance with Section 22 of the Agreement."

Another grievance form dated April 13, 1958 received by the Company on April 15, 1958 was filed by each of the grievants and each of those forms read in pertinent part as follows:

"I was unjustly dealt with by being suspended and denied Union representation at a hearing and then being terminated for insisting on my rights under Section 22 of the Current agreement to have Union representation present at this investigation. I hereby request a hearing on my discharge in accordance with the above mentioned Section and further request that I be reinstated without loss of seniority and that I be made whole for any loss of pay involved."

As noted in our Preliminary Statement, these grievances were all disallowed by the Company.

The above background suffices for an understanding of the issues involved in this proceeding and of the respective contentions of the parties. Other facts of record pertinent to a disposition of this dispute will be treated with as necessary in our Discussion below.

[fol. 20] Discussion.

We think it is clear from the outline of the facts which we set forth above that the main issue presented to the Board for determination is whether or not the Company was in violation of the Agreement in discharging the employees here involved. We shall, therefore, initially devote our consideration to a determination of that issue.

The governing Agreement between the parties was originally made between Central Airlines, Inc. and the Air Carrier Mechanics Association International effective September 1, 1955 and subsequently made applicable to the International Association of Machinists when that organization became the certified bargaining representative of the employees. The discipline section in that contract is numbered 22 and reads as follows:

"Section 22—Investigation and Discipline.

(a) Hearing:

1. An employee shall not be disciplined or dismissed from the service of the Company without notification in writing of such action. An employee who is disciplined or dismissed shall be entitled to an investigation and hearing thereon, provided that such employee makes written request for such investigation and hearing within seven (7) days after receiving such notification.

2. An employee may be held out of service by the Company pending such investigation and hearing and appeals therefrom.

3. Such written request for an investigation and hearing shall be addressed to the employee's immediate supervisor [fol. 21] with a copy to the Operations Manager of the Company.

4. Prior to such investigation and hearing, such employee shall be notified in writing by the Company of the precise charge or charges against him. He shall be given the necessary time, not exceeding seven (7) days, in which to secure the presence of witnesses and shall have the right to be represented by the employee of the Company of his choice or by his duly accredited representative or representatives.

5. Such investigation and hearing shall be held by a maintenance supervisor of the Company, designated by the Company for that purpose, and shall be held within seven (7) days after the receipt of the employee's written request therefor.

6. Within ten (10) days after the close of such investigation and hearing the Company shall announce its decision in writing and shall furnish the employee, or his duly accredited representative, a copy thereof.

(b) Appeal:

1. When a copy of such decision has been received by the employee or his duly accredited representative or representatives, and if such employee is dissatisfied with the

Company's decision, he shall have the right to appeal to the chief operating officer of the Company, provided such appeal request is filed by the employee in writing with the chief operating officer of the Company within seven (7) days from the date such employee receives a copy of the Company's decision of the first investigation and hearing provided in Paragraph (a) of this Section. Such appeal [fol. 22] hearing shall be held within seven (7) days after the receipt of the employee's written request therefor by the chief operating officer of the Company.

2. Within ten (10) days after the close of such investigation and hearing the Chief Operating Officer shall announce his decision in writing and shall furnish the employee or his duly accredited representative or representatives, with a copy thereof.

(c) General:

1. If any decision made by the Company under the provisions of this Section is not appealed by the employee affected within the time limit prescribed herein for such appeals, the decision of the Company shall become final and binding.

2. If, as a result of any hearing or appeal therefrom as provided herein, an employee is exonerated, he shall, if he has been out of service, be reinstated without loss of seniority and shall be paid for such time lost in an amount which he would have ordinarily earned had he continued in the service during such period.

3. If, as a result of any hearing or appeal therefrom as provided herein, the employee shall be exonerated, his personnel record shall be cleared of the charges.

4. When it is mutually agreed that a stenographic record is to be taken of the investigation and hearing in whole or in part, the cost will be borne equally by both parties to the dispute. In the event it is not mutually agreed that a stenographic report of the proceedings shall be taken, any written record available taken of such investigation and hearing made by either of the parties to the dispute shall [fol. 23] be furnished to the other party to the dispute

upon request, provided that the cost of such written record so requested shall be borne equally by both parties to the dispute.

5. After the appeal provisions hereinbefore provided have been complied with, further appeal by the employee, if made, shall be to the Central Airlines, Inc. Mechanics' System Board of Adjustment as provided for in the "Agreement between Central Airlines, Inc., and the Air Carrier Mechanics in the service of Central Airlines, Inc. as represented by the Air Carrier Mechanics Association, International, dated September 1, 1955, covering the establishment and maintenance of a System Board of Adjustment "provided such appeal is made within thirty (30) days from the date of receipt by the employee or his duly accredited representative of the decision of the Chief Operating Officer. All submissions to the System Board of Adjustment shall be made in conformity with Paragraph (h) of the Adjustment Board Agreement.

6. Nothing in this Agreement shall extend the right of investigation and hearing provided for in this Section to probationary employees."

The Company argues that the grievances concerning the alleged violation of the Agreement on April 7th in denying Union representation were not timely filed inasmuch as they were not received by the Company until April 15, more than seven (7) days after the alleged occurrence. On the other hand, the record reveals that the Company conceded that the grievances protesting the discharge were timely filed under Section 2? of the Agreement. Apparently, this contention goes to the right of the grievants to grieve over [fol. 24] the denial of Union representation at the "interview" scheduled for April 7. It is, however, the occurrence of the discharge which is the subject matter of the grievance and since it was the refusal of the employees to attend such "interview" when the Company had refused Union representation the question of whether or not Union representation was properly denied is inextricably bound into the discharge grievances. Since it is clear that the discharge grievances were timely filed it necessarily follows that this contention is lacking in merit.

The Company further argues that the discharge grievances were not appealed from Maintenance Director Vaughan to Vice-President Wageneck in accordance with the grievance procedure. At a System Board hearing on June 19, 1958 Mr. Frank Harvey, General Chairman of the I.A.M. on Central Airlines and employee member of this Board conceded that he had traced the signatures of the grievants on the appeal letters in his representative capacity. It is argued that the appeal provided for in Section 22, Paragraph 6 (a) must be filed by the employee. Paragraph 6 of Section 22 is somewhat ambiguously worded. It first provides that the Company shall furnish the employee or his duly authorized representative with a copy of its decision on the first step. It then provides that when a copy of the decision has been received by the employee or his duly authorized representative he shall have the right to appeal etc. within ten days from the date such employee receives a copy of the Company's decision. It would be absurd to hold that the failure of the duly accredited representative to deliver a copy of the Company's decision to the employee affected would indefinitely extend the time within [fol. 25] which to appeal. Clearly, the parties contemplated that receipt of the Company's decision by the duly authorized representative would be the equivalent of receipt by the employee involved and that the time within which to appeal would commence to run when either of them received the Company's decision. This clearly demonstrates that the intent of Paragraph 6 cannot be given full force and effect in a reading of one clause or one sentence disassociated from the context. The parties have used the terms "employee" and "duly authorized representative" indiscriminately and it is only logical to conclude from a reading of Paragraph 6 in its entirety that they intended that the duly accredited representative should be considered as standing in the shoes of the employee with respect to the procedural matters covered thereby. Furthermore, on general principles of agency it would appear that the action of the General Chairman need only be authorized to make it the action of the employee. Presumptively, as a duly authorized representative the General Chairman would have the necessary authority. There is nothing to show that his

authority was in any way repudiated or disclaimed by the employees involved. We, therefore, find no merit in this contention of the Company.

The Company further contends that the appeal to the System Board of Adjustment was not in accordance with the provisions of the Collective Bargaining Agreement. In support of this contention, the Company points to Article 22 (a)5 and to Paragraph (e) and (h) of the Agreement covering the Establishment and Maintenance of a System Board of Adjustment.

What we had to say with respect to the right of the duly authorized representative to appeal on behalf of the employee involved from the decision of the Company in the first step applies equally to the right of appeal to the [fol. 26] System Board of Adjustment. It is noted that Paragraph 5 of Section 22 provides that such appeal must be made within 30 days from the date of receipt by the employee or his duly accredited representative, which is another manifestation of the parties' concept of the duly accredited representative in effect being the equivalent of the employee insofar as the procedural aspects of Section 22 are concerned.

Paragraphs (e) (f) and (h) of the System Board of Agreement provide as follows:

"(e) The Board shall have jurisdiction over disputes between any employee covered by the Mechanics' Agreement and the Company, growing out of grievances or out of interpretation or application of any of the terms of the Mechanics' Agreement. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation, or working conditions covered by existing agreements between the parties hereto.

"(f) The Board shall consider any dispute properly submitted to it by the President of the Association or by the Vice-President of Operations of the Company when such dispute has not been previously settled in accordance with terms provided for in the Mechanics' Agreement. No matter shall be considered by the Board which has not first been handled in accordance with the appeals provisions of the

Mechanics' Agreement, including the rendering of a decision thereon.

"(h) All disputes properly referred to the board for consideration shall be addressed to the Chairman. Five copies of each petition, including all papers and exhibits in connection therewith, shall be forwraded to the Chair- [fol. 27] man, who shall promptly transmit one copy thereof to each member of the Board. Each case submitted shall show:

1. Question or questions at issue
2. Statement of facts
3. Position of employee or employees
4. Position of Company

When possible, joint submissions should be made, but if the parties are unable to agree upon a joint submission, then either party may submit the dispute and its position to the Board."

The Company contends that the Petition for System Board hearing does not accord with these provisions of the Agreement because:

"(1) It was not submitted by the alleged grievants or by the "President of the Association" (See J (f);

(2) it did not include or submit "all papers and exhibits in connection therewith" (See J (h);

(3) it does not contain a "Statement of facts" and that which is set forth under such heading is stated to be "The facts of the Union's case * *" and not of the purported grievants;

(4) it does not contain a statement of the "Position of employee or employees" but instead purports to state the "Position of the Union"; by reason of which such petition [fol. 28] did not effect an appeal or submission of the purported grievances to the Board."

We do not view Paragraph (e) of this Agreement as constituting a requirement that the appeal to the System Board of Adjustment must be personally signed by the

employee involved. It is an expression of the scope and extent of the jurisdiction of the Board. Paragraph (f) does not appear to apply to the situation here present since as we have already indicated the dispute was properly appealed under Section 22 (e)5. The petition sets forth sufficient facts for the Board to be fully acquainted with the matter in dispute and intelligently act upon it. Those are the apparent purposes of the requirements of Paragraph (h) of the System Board Agreement. The fact that the Position is stated as that of the Union rather than of the employee or employees is not a fatal defect. The Union as the duly accredited representative may act for the employee and certainly acts for the employees as a unit. That the petition did not include or submit all papers in connection therewith is also not fatally defective. It had a reference to the prior proceedings and papers which clearly identified them as the papers involved and they were all in the Company's possession. Clearly, the Company could not be prejudiced nor surprised in any way at the System Board hearings on this score.

The above discussion covers the jurisdictional and procedural objections raised by the Company. Having found them to be of no merit, we conclude that the dispute is properly before the Board for disposition on the merits.

In sum, the Company argues that the grievants were not entitled to Union representation at the "interview" before [fol. 29] Mr. Vaughan on April 7, 1958 because that was not an investigation or hearing such as is provided for in Section 22 of the Agreement. In support of this contention, in the main the Company asserts that it was made crystal clear in the written instructions to report to Mr. Vaughan that the Company was making its own investigation to determine what, if any, action it should take and that no determination had yet been made concerning the fault of the employee or the assessment of discipline, that no discipline had been imposed, that no griveance had been filed at that time and that no request had been made for an investigation or hearing by any of the grievants pursuant to the provisions of Section 22. The Company, therefore, concludes that the grievants had no right to refuse to com-

ply with the instructions to report for interview and that there is no support or justification in fact or law for their exoneration.

In sum, the Union argues that it is obvious that disciplinary action had been taken by the Company in suspending the grievants from service pending investigation, that it is clear from Paragraph 1 of Section 22 that an employee who is either disciplined or dismissed is entitled to an investigation and hearing thereon if he makes timely request therefor, that the Company short-circuited the normal procedure by scheduling an investigation and hearing, that the only investigation and hearing in the contemplation of Section 22 is the one to which an employee is entitled if he is disciplined or dismissed and consequently the right to representation attached to the "interview" in Mr. Vaughan's office on April 7, 1958. The Union further argues that many decisions of arbitrators support the proposition that employees are entitled to Union representation in discussion with the Company concerning matters relating to [fol. 30] their employment or work performance even without the formalization of a disciplinary suspension.

It is difficult to find any basis for the Company's assertion that no disciplinary action had been taken against the grievants before the time of the scheduled "interview" with Mr. Vaughan on April 7, 1958. The suspension letters the body of which we quoted under our heading "Background of the Dispute" clearly indicated that the employees were suspended. Those letters further concluded with a paragraph which stated that if the Company found that the grievants were not at fault, they would be returned to service and would be made whole for any loss of pay they may have suffered by reason of their suspension. It is difficult to conceive of any statement which would establish more clearly that, as of the time Mr. Vaughan wrote those letters, the Company considered the grievants as suspended without pay pending a determination of their fault or lack of it. The irrefutable implication is that if they were found at fault the suspension would be without pay and continued indefinitely. In any disciplinary proceeding it follows as day follows night that if an employee is found not at fault

he will be made whole for losses sustained. The concluding paragraph of the letter therefore in effect re-emphasizes the disciplinary nature of the suspension. If further substantiation is needed for the conclusion that disciplinary action was contemplated by the Company and put into effect by the issuance of the suspension letters, it can be found in the testimony of Mr. Wageneck and Mr. Vaughan before the Special Board of Adjustment on June 18, 1958. Mr. Wageneck, speaking of a conversation with Mr. Vaughan prior to the issuance of the suspension letters stated " * * * but, if I remember, I told Dave, I said, 'There's no use to ask the [fol. 31] people to work overtime. In my opinion it is concerted action. I will give you the answers as to what we are going to do with these people. But my thinking is at this time that we will suspend them'." Mr. Vaughan, during the course of examination by Union counsel, testified as follows:

"Q. Now, these letters advised the employees that they were suspended. Is that correct?

A. That is correct.

Q. And what do you mean by suspended? That meant out of service, did it not?

A. That is correct.

Q. Now, these employees were not put to work on Friday —I mean on Saturday, were they?

A. No, sir.

Q. They were not put to work on Saturday and they were not put to work on Monday, either, were they?

A. That's correct.

Q. Were they paid for any time Monday?

A. No, sir.

Q. You considered them suspended as of Monday and any time that they came on Monday was simply, so far as you were concerned, to report for a hearing. Is that correct?

A. That is correct.

Q. Which would not be on company time, but which would be outside of time for which they would be paid. Is that correct?

A. That is correct."

The only provision of the Agreement covering investigation and hearing following discipline is found in Section 22. This Section clearly indicates that the Company may take disciplinary action without the formality of a hearing or an [fol. 32] investigation. It would be entirely destructive of the rights afforded the employees under Section 22 to say that the Company may discipline an employee, call the employee in for an interview on the subject matter forming the basis for the discipline and then say to him "You are not entitled to representation because this is not a hearing under Section 22 since you did not make a request for it." Regardless of the fact that the Company called the scheduled session of April 7, 1958 in Mr. Vaughan's office an "interview" it is quite clear that it was to be a hearing on the grievants' failure to perform work assignments as directed. As a matter of fact, Mr. Vaughan looked upon it as a hearing, as is evidenced by that part of his testimony quoted above. In effect, what happened here was that the Company "jumped the gun" on the procedure set forth in Section 22(a). In doing so, it cannot be heard to say that the employees involved had no right to Union representation at the hearing. Manifestly, to hold otherwise in the circumstances of this case would render completely worthless the rights of the employee as set forth in Section 22(a)4.

We can only conclude that the Company's refusal to allow the grievants the right of representation at the hearing scheduled for April 7, 1958 was in violation of Section 22 of the Collective Bargaining Agreement. Under the circumstances of this case, since it was clear that such representation was to be denied to them, it would have been a vain act for them to attend the hearing in the Vaughan office without representation since any action which might be taken by the Company as a result of the hearing would have been null and void. In other words, this was not an "obey now and grieve later" situation. It follows that [fol. 33] the discharge of the grievants was in violation of the contract and the grievances should be sustained.

Since we have found that the discharge was unjustified, there is no reason to consider the suspension grievances because they were in effect merged into the discharge

grievance. This also renders unnecessary a consideration of the varying contentions of the Union and the Company with respect to the right of the Company to require the grievants to work overtime. We pass no judgment on the merit or lack of merit in those contentions. Neither do we pass judgment upon the attitude of the grievants in refusing to work overtime or the action taken by the union subsequent to the suspensions.

Award.

The grievances of April 13, 1958 of Messrs. R. K. Doud, S. V. Cornstubble, O. L. Broome, C. R. Casey, P. R. Davis and E. E. Fuqua are sustained. They are entitled to reinstatement without loss of seniority and should be made whole for any loss of pay involved as requested in the grievances filed with the Company as provided in the Collective Bargaining Act.

(S.) FRANCIS J. ROBERTSON,
Neutral Referee,

(S.) FRANK G. HARVEY,
Union Member,

(S.) DAN G. BLUE,
Union Member,

[fol. 34]

F. E. HOWE,
Company Member,

HAROLD MUELLER,
Company Member.

Dated Washington, D. C.
November 3, 1959.

In United States District Court

Motion to Dismiss and Answer Subject Thereto— Filed December 17, 1959

To the Honorable Judge of the United States District Court for the Northern District of Texas, Fort Worth Division:

Now comes the defendant Central Airlines, Inc., and files this its motion to dismiss, and subject to said motion, its answer to the plaintiffs' complaint, and for grounds for same would respectfully show the Court the following:

1.

Defendant respectfully moves this Court to dismiss the above styled action because, as appears from the complaint, the Court has no jurisdiction for the reason that the action is between citizens of the State of Texas and presents for determination by this Court no question arising under the Constitution, laws or treaties of the United States, or otherwise within the jurisdiction of the Federal District Courts.

[fol. 35] Wherefore, the defendant respectfully prays that the plaintiffs' action be dismissed, and that the defendant be discharged with its costs.

2.

Subject to the foregoing motion to dismiss, the defendant moves the Court to dismiss herefrom the plaintiff International Association of Machinists for the reason that such labor organization has no interest in the cause of action herein asserted nor is it entitled to recover any sum even if a cause of action be asserted and has therefore no justifiable interest in this controversy and is not a proper party hereto.

Wherefore, the defendant prays that such International Association of Machinists be dismissed herefrom.

Answer.

Subject to the motion to dismiss, the defendant files this its answer to the plaintiffs' original complaint on file herein and for such answer would respectfully show the Court the following:

1.

Defendant admits the allegations of Paragraph 1 of plaintiffs' complaint.

2.

Defendant admits that the plaintiffs R. K. Doud, S. V. Cornstubble, O. L. Broom, C. R. Casey, P. R. Davis and E. E. Fuqua, were employees of the defendant Central Air-[fol. 36] lines until April 7, 1958, on which date the services of each of the named plaintiffs were terminated. Defendant likewise admits that each of the named plaintiffs are residents of Tarrant County, Texas.

3.

Defendant admits the allegations of Paragraph 3 of the plaintiffs' original complaint.

4.

Defendant admits the allegations of Paragraph 4 of the plaintiffs' original complaint.

5.

Defendant admits the allegations of Paragraph 5 of plaintiffs' original complaint.

6.

Defendant admits the allegations of Paragraph 6 of plaintiffs' original complaint, insofar as said allegations go, but would show the Court that the System Board of Adjustment was established by the Air Carrier Mechanics' Association and the defendant Central Airlines, Inc., solely by means of a written contract and agreement dated August 28, 1955, which contract defines and limits the jurisdiction

of the System Board of Adjustment thereby established. It is shown to the Court that while the System Board of Adjustment was authorized by the Railway Labor Act, it exists and derives its authority solely by means of the con-
[fol. 37] tract between the parties of August 28, 1955, which contract by its terms specifically establishes said Board of Adjustment and outlines the mechanics and procedure for the hearing of disputes by said Board. The System Board of Adjustment is in actuality a creature of contract and not of federal statute.

7.

Defendant admits the allegations contained in Paragraph 7 of plaintiffs' original complaint.

8.

Defendant admits the allegations contained in Paragraph 8 of plaintiffs' original complaint, except that the defendant denies the allegation of such paragraph reading, "and which had been processed in due course through the requisite preliminary steps."

9.

Defendant admits that part of Paragraph 9 of the original complaint which alleges that on November 3, 1959 an award in the case was handed down by the "neutral referee," which award was joined in by both union members of the Board. However, the defendant denies that the award was effective immediately when signed by a majority of the Board, for the reason that said award was null and void and of no force and effect ab initio.

10.

Defendant denies the allegations contained in Paragraph 10 of plaintiffs' original complaint.

[fol. 38]

11.

Defendant denies the allegations contained in Paragraph 11 of the original complaint.

12.

Defendant denies the allegations contained in Paragraph 12 of the original complaint.

13.

The purported award is void and unenforceable and neither creates nor is a basis for the cause of action asserted, or any other cause of action against this defendant, for each of the following reasons:

(a) The System Board had no jurisdiction or authority to entertain or pass on the purported discharge grievances for the reason that they were not appealed in accordance with the requirements of the Mechanics' Agreement which was a condition precedent to the acquisition of jurisdiction by such Board.

(b) The purported award is in excess of the jurisdiction and authority of such Board for the reason that it purports to set aside and change express and unambiguous provisions of the governing Agreements and to go outside the provisions of such Agreements in an unsupported and unlawful attempt to sustain jurisdiction and the purported discharge grievances.

(c) The "Neutral Referee" in the preparation of his opinion and purported award and in making the findings and conclusions therein set forth, in which H. G. Harvey [fol. 39] and Dan Blue, representatives of the International Association of Machinists, have joined, ignored and failed and refused to take into account or give effect to admissions and declarations against interest made by plaintiffs or in their behalf, and uncontradicted and unimpeached evidence and testimony which if given effect would destroy the conclusions upon which the purported award is sought to be based, all of which constitutes arbitrary and capricious conduct, gross error, not an honest judgment, and a legal fraud in respect to Central's rights, thereby rendering such purported award a nullity and unenforceable.

(d) The findings and conclusions on which the purported awards are based are not supported by and are contrary to the substantial evidence and are merely disingenuous carvings and distortions of the evidence referred to amounting to and constituting palpable gross error, arbitrary action, and a legal fraud in respect to Central's rights, thereby rendering such purported award a nullity and unenforceable.

(e) The purported award is void and unenforceable and in excess of the jurisdiction and authority of the Board in that it purports to impose conditions, limitations and restrictions on the rights of Central and on the exercise thereof and otherwise to fix and prescribe the same, all outside the governing agreements and without any semblance of right or authority so to do.

(f) The purported award is void and unenforceable for the reason that it does not dispose of the issues presented, assuming without admitting jurisdiction, particularly, among others, in respect to the failure and refusal of the [fol. 40] individual plaintiffs to comply with orders to work overtime which gave rise to the entire controversy and which the purported award ignores completely by not passing thereon and by directing the reinstatement of the individual plaintiffs without regard thereto, notwithstanding the governing Agreement provides for reinstatement only in the event the employee is exonerated.

(g) The purported award is arbitrary and capricious, and evidences and is based upon partiality, misconduct and gross mistake, in fraud of Central's rights.

For each and all of the foregoing reasons and grounds the award is void and unenforceable and gives no cause of action and plaintiffs are not entitled to recover thereon.

Wherefore, Premises Considered, the defendant prays that this cause of action be dismissed, or, in the alternative, that the International Association of Machinists be dismissed herefrom, or in the event that such cause of action be not dismissed, that on final hearing the plaintiffs recover nothing herein and that this Court adjudge the award to be

void and without full force and effect, and for such other relief as may be just and necessary under the circumstances.

Respectfully submitted,

Hudson, Keltner, Jordan & Cunningham, By Walter E. Jordan,

1313 Continental Life Building,
Fort Worth 2, Texas.

[fol. 41] Karl H. Mueller,
Attorneys for Defendant.

Burk Burnett Building,
Fort Worth, Texas.

Certificate of service (omitted in printing).

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed December 17, 1959

To the Honorable Judge of Said Court:

Now comes Central Airlines, Inc., the defendant in the above case, and files this its motion to dismiss, and for such motion respectfully shows the Court the following:

1.

The defendant, as shown on the face of such pleading, is a Nevada corporation with its principal office at [fol. 42] Amon Carter Field in Tarrant County, Texas, and is, under the applicable federal statutes, a citizen of Texas, and the plaintiffs Cornstubble, Broome, Casey, Davis and Fuqua are also citizens of the State of Texas and therefore there is no diversity of citizenship such as would give this Court jurisdiction of this cause.

2.

As the complaint herein, with the exhibits thereto attached, shows this suit is brought by the individual plain-

tiffs to enforce an award by an arbitrator (or neutral referee) pursuant to a contract and presents no cause of action arising under the Constitution or the laws of the United States and there is no substantial federal question.

3.

In the alternative and in the event that the whole cause of action is not dismissed, defendant prays that the International Association of Machinists a named plaintiff, be dismissed herefrom because said complaint on its face shows that such labor organization has no justiciable interest in this controversy, could recover nothing herein and that the only recovery herein, if any recovery there could be, would be in behalf of the named plaintiffs and such labor organization therefore has no interest in the cause of action asserted and no justiciable right to be a party herein.

Wherefore, Premises Considered, the defendant prays that the entire cause of action be dismissed for want of jurisdiction, or, in the alternative, if the whole cause of [fol. 43] action be not dismissed then the International Association of Machinists be dismissed herefrom as a party plaintiff, or for such relief as may be just under the circumstances.

Hudson, Keltner, Jordan & Cunningham, By Walter E. Jordan,

1313 Continental Life Building,
Fort Worth 2, Texas.

Karl H. Mueller,
Attorneys for Defendant.

Burk Burnett Building,
Fort Worth, Texas.

Certificate of service (omitted in printing).

[fol. 44]

IN UNITED STATES DISTRICT COURT

REPLY TO MEMORANDUM BRIEF OF CENTRAL AIRLINES, INC.—Filed January 4, 1960

To the Honorable Judge of Said Court:

Central Airlines, Inc., Defendant in the first of the above cases and plaintiff in the second, hereinafter called Central, has filed a memorandum alleging the absence of a Federal question in these cases. It relies upon Metcalf vs. National Airlines [38 CCH Labor Cases P65,978] decided by the U. S. Court of Appeals for the Fifth Circuit December 1, 1959. That case was thus decided one day after the International Association of Machinists, et al., hereinafter referred to as I.A.M., filed Civil Action No. 4220 and removal was effected in Civil Action No. 4221. The Fifth Circuit in the Metcalf case reaffirmed its decision in Sigfrad vs. Pan American World Airways 230 F.2d 13, and stated that "The law to be applied in determining the reviewability of the award was Federal rather than State law. We did not consider the question whether the State or Federal Court was the proper forum to entertain the action." In Metcalf the Court did not have before it the same jurisdictional questions requiring construction of the Railway Labor Act as are present in the instant case. We submit that this distinction is vital.

Central alleged in its brief that it "not only did not make any mention of any federal law, the Railway Labor Act or any other, specifically, but it did not even raise the Railway Labor Act or any other federal act by implication." [fol. 45] This is not correct. Central relied upon, incorporated by reference, and quoted in full, the System Board Agreement between the parties (Exhibit B to its petition) which incorporated the Railway Labor Act, and writes thereunder, in paragraph (n) thereof, reading in part as follows: "nothing herein shall be construed to limit, restrict, or abridge the rights or privileges accorded either to the employees or to the employer, or to their duly accredited representatives, under the provision of the Rail-

way Labor Act, as amended . . . " Furthermore, Central affirmatively alleged, by quoting paragraph (b) of the same Exhibit B that said System Board was established "in compliance with Section 204, Title II, of the Railway Labor Act, as amended. . . . "

The aforesaid references to the Railway Labor Act are not surplusage in determining the validity of the System Board award in question. On the contrary a construction of the Railway Labor Act is absolutely necessary in considering said award, because the conduct of which the System Board found Central guilty was the deprivation of union representation at a grievance hearing. The individual employee's rights to union representation flow not alone from the direct language of the collective bargaining agreement but also from the language of the Railway Labor Act incorporated in the agreement by references, for example see the sections of the Railway Labor Act affirmatively cited and relied upon in the petition for removal, pages 3, 4 and 5.

Thus, this case differs substantially from the Metcalf case for the instant case cannot be decided without determining the employees' rights of union representation in the [fol. 46] circumstances. Such determination must be made based upon contract and federal statute for such rights ultimately derive from federal statute.

Central is incorrect in alleging that only private rights derived from contract are involved. This is especially so in view of the deprivation of rights of union representation at issue in the case. But it is generally also true as noted in Edwards vs. Capitol Airlines, 176 F.2d 755, 84 U. S. App. D. C. 346, Cert. den. 70 S.Ct. 186, 338, U. S. 885, 94 L.Ed. 543 in which the Court held, in reviewing the action of a similarly created system board of adjustment 176 F.2d 755, 760:

"This Board is not the Railway Adjustment Board, whose functions and power are fixed by the statute. This is a board created by contract. But the right to create it was reserved to the parties by the original Act, and A DUTY TO CREATE IT WAS IMPOSED, BY A LATER AMEND-

MENT, UPON EVERY CARRIER AND * * * ITS EMPLOYEES, ACTING THROUGH THEIR REPRESENTATIVES.' THIS GIVES IT A PUBLIC CHARACTER THAT CANNOT BE IGNORED." (Emphasis added.)

We submit that a federal question is involved in these law suits. Therefore, this Honorable Court should retain jurisdiction based upon such federal question. We are, of course, aware of the fact that Central Airlines, Inc. is a Nevada corporation and that the petition for remand could have been based upon diversity jurisdiction; however, we sought to invoke federal jurisdiction on the one ground which we deem important in view of the fact that it is our [fol. 47] position that a federal question is involved and a federal statute must be construed in connection with this case. We do not seek jurisdiction here on grounds of diversity, because we are certain that our state judges will provide us a fair and capable forum for adjudication of the issues in these cases. We certainly do not feel that I.A.M. or any of the grievants will be prejudiced in any way by virtue of their cases being decided in the state Courts. Therefore, the single reason for invoking jurisdiction of this Honorable Court is the existence of the federal statute which must be construed and we seek determination of these federal rights through the federal Courts.

We wish to note one further item. Although Central sought to dismiss the I.A.M. from case No. 4220 as a party plaintiff, we note that no argument in support of that position is contained in its memorandum brief. It is really too plain for argument that the union is a proper party to the law suit for the reason that the contract on which Central claims its action is based is with the I.A.M. and not with individual employees. The I.A.M., pursuant to the Railway Labor Act, is their exclusive bargaining representative and it is the acts of the I.A.M. which Central alleges as reason for the System Board of Adjustment award being invalid. Obviously, the union has a justiciable interest in the proceeding.

For reasons stated hereinabove, the I.A.M. and the grievants involved pray that this Honorable Court retain jurisdiction.

Respectfully submitted,

Mullinax, Wells, Morris & Mauzy,
[fol. 48] 1610 National Bankers Life Bldg.,
Dallas 1, Texas.

By Charles J. Morris, Plato E. Papps, Chief Counsel, Int'l. Association of Machinists, Attorneys for Defendants.

1300 Connecticut Avenue,
Washington 6, D. C.

IN UNITED STATES DISTRICT COURT

ORDER OF DISMISSAL—Entered January 15, 1960 and Filed January 18, 1960

In the District Court of the United States for the Northern District of Texas, Fort Worth Division.

Civil Action No. 4220

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS and E. E. FUQUA,

VS.

CENTRAL AIRLINES, INC.

On the 4th day of January, 1960, the motion to dismiss the above styled and numbered cause of action filed by the defendant herein, was presented to the Court for hearing, and all parties herein appeared by and through their at-

torneys of record. The defendant's motion to dismiss this cause was based on the premise first that there was no diversity of citizenship for the reasons that all parties herein are citizens and residents of the state of Texas, and next [fol. 49] that this action presents for determination by this Court no question arising under the Constitution, laws or treaties of the United States, or otherwise within the jurisdiction of the Federal District Courts. The Court, after hearing oral argument of counsel for all parties, and after considering the pleadings of the parties, including the defendant's motion to dismiss, and briefs filed herein by both parties, is of the opinion that the defendant's motion to dismiss the above styled and numbered cause of action should be sustained and granted by this Court.

It is Therefore Ordered, Adjudged and Decreed that the above styled and numbered cause of action be, and it is hereby dismissed, from the docket of this Court, for the reasons that there is no diversity of citizenship involved, and that further there is no federal question involving the Constitution, laws or treaties of the United States which would confer jurisdiction upon this Court, and it is further ordered, adjudged and decreed that all costs of Court be taxed against the plaintiff herein.

Signed and Entered this 15 day of January, 1960.

T. Whitfield Davidson, Judge, District Court of the United States for the Northern District of Texas, Fort Worth Division.

[fol. 50]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed February 12, 1960

In the United States District Court for the Northern District of Texas, Fort Worth Division.

Civil Action No. 4220

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS and E. E. FUQUA, Plaintiffs,

vs.

CENTRAL AIRLINES, INC., Defendant.

Formal notice is hereby given, that International Association of Machinists, AFL-CIO, R. K. Doud, S. V. Cornstubble, O. L. Broom, C. R. Casey, P. R. Davis and E. E. Fuqua, the above named plaintiffs, hereby appeal to the Court of Appeals for the Fifth Circuit from the order of dismissal in said cause entered on the 15th day of January, 1960.

Dated: February 12, 1960.

Mullinax, Wells, Morris & Mauzy,
1601 National Bankers Life Bldg.,
Dallas 1, Texas.

By Charles J. Morris.

This is to certify that the foregoing notice of appeal was sent by mail to all of the parties to the proceeding through their attorneys as follows:

Hudson, Keltner, Jordan & Cunningham, 1313 Continental Life Building, Fort Worth 2, Texas.

[fol. 51] Mueller & Mueller, Burk Burnett Building, Fort Worth, Texas, Charles J. Morris.

* * * * * * *

Bond on appeal for $250.00 filed February 12, 1960 (omitted in printing).

[fol. 53]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed March 16, 1960 (omitted in printing)

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[fol. 54] Clerk's Certificate to foregoing transcript (omitted in printing).

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[fol. 55]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—November 7, 1960 (omitted in printing)

[fol. 56]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18286

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS and E. E. FUQUA, Appellants,

versus

CENTRAL AIRLINES, INC., Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

OPINION—October 13, 1961

Before RIVES, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The sole issue here is whether a federal court has jurisdiction of this suit as one arising under the laws of the United States.

The International Association of Machinists, AFL-CIO, the certified bargaining representative of Central Airlines' mechanics and stock and stores employees, joined by six [fol. 57] aggrieved employees, sued Central Airlines, Inc. in the United States District Court for the Northern District of Texas. The plaintiffs ask for enforcement of an award rendered by a system board of adjustment (arbitration). There is no diversity of citizenship. As to jurisdiction, the complaint alleges only that the court has jurisdiction of this action under 28 U. S. Code Section 1331,[1] "this being a matter . . . [that] arises under the laws of the United States, specifically under the Railway Labor Act." The district court dismissed the suit for lack of jurisdiction. We affirm.

Central Airlines and the Union entered into a System Board Agreement in accordance with Section 184 of the Railway Labor Act[2] imposing a duty on every air carrier

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[1] The federal question problem is the same under § 1337 as under § 1331, except that § 1331 is somewhat more general and the amount in controversy must exceed $3000 (now $10,000). 62 Stat. 930 (1948), 28 U.S.C.A. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States." Prompted by questions from the court during oral argument, counsel for appellants filed a supplemental brief devoted in part to the contention that jurisdiction exists also by virtue of 28 U.S.C.A. § 1337. Section 1337 provides: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

[2] 44 Stat. 577 (1926) as amended to apply to the airline industry by 49 Stat. 1189 (1936), 45 U.S.C.A. §§ 151-88. Section 184 provides:

> "The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936, before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operation officer of the carrier designated to handle such disputes; but, failing to

[fol. 58] and its employees, acting through their representatives, to establish a board of adjustment to settle disputes "growing out of grievances or out of the interpretation or application of any of the terms of [the collective bargaining agreement]". Pending the establishment of a permanent national board, similar to the National Railroad Adjustment Board, airlines and their employees are dependent upon contract for the establishment of adjustment boards.[3] Section 184 does not define the jurisdiction of a board, except to the extent of providing that a board shall have "jurisdiction not exceeding the jurisdiction which may be exercised by system, group, or regional boards of adjustment, under the authority of Section 153 of this title".[4] It is clear, therefore, that although the statute requires the parties to establish a board, without a contract there would

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reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title. . . ."

Section 153, Second permits any carrier and its employees to agree "to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section." Section 153 (i) provides that "[t]he disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred . . . to the appropriate division of the Adjustment Board. . . ."

[3] In referring to a similar airline system board the court said: "This Board is not the Railway Adjustment Board, whose powers and functions are fixed by the statute. This is a Board created by contract." Edwards v. Capital Airlines, D. C. Cir., 1949, 176 F. 2d 755, 760. See also National Airlines v. Metcalf, 5 Cir., 1959, 271 F. 2d 817.

[4] See footnote 2.

[fol. 59] be no board. It is also clear that the parties must look to the contract for the composition, procedures, and jurisdiction (within Section 153) of an airline system board of adjustment.

In April 1958 Central discharged six of its employees, the individual plaintiffs, because they refused, while under suspension from the Company, to attend a hearing at which the Company denied them the right to have a union representative present. The discharged employees went through the preliminary stages of a formal grievance proceeding without reaching settlement, and the Union appealed the case to the system board of adjustment. The board, composed of two company representatives and two union representatives, deadlocked on the case. The National Mediation Board then appointed a neutral referee. The five-member board held that Central's refusal to allow the grievants the right of representation and the discharge of the grievants violated the collective bargaining agreement. The board rendered an award ordering that the six discharged employees be reinstated without loss of seniority and with full pay during the term of their attempted discharge. Central refused to comply with the award on the ground that the board exceeded its jurisdiction and authority as set forth in the "Governing Agreement" between the parties "covering the establishment and maintenance of a System Board of Adjustment".

I.

The appellants' broadest contention, based on *Textile Workers* v. *Lincoln Mills*, 1957, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972, is that the rights asserted in their com- [fol. 60] plaint are necessarily federal rights flowing from federal law. The argument runs something like this: just as the Labor Management Act is a congressional mandate to federal courts to fashion federal law governing the substance of collective bargaining agreements under that act, the Railway Labor Act is a direction to create a body of substantive federal law governing the substance of collective bargaining agreements in the airline industry; the plaintiffs' cause of action comes from this new body of

federal substantive law. Appellants recognize, of course, that Section 301 of the Labor Management Relations Act excludes any persons covered by the Railway Labor Act, but they contend that the two statutes, construed together, show a consistent statutory pattern.

A crucial difference between two statutes may be more significant than similarities. So it is here. Section 301 of the Labor Management Relations Act provides specifically for federal district court jurisdiction over suits involving collective bargaining agreements in industries affecting interstate commerce.[5] It was this provision that the Supreme Court interpreted in Lincoln Mills as "more than jurisdictional". In itself it was the statutory source for the congressional direction that federal courts "fashion a body of federal law for the enforcement of collective bargaining agreements". 353 U. S. 448, 451. But there is no specific [fol. 61] statutory provision for district court jurisdiction over suits under Section 184 of the Railway Labor Act. Since Section 184 has no express grant of jurisdiction that is "more than jurisdictional" and has no language even remotely equivalent to Section 301, Section 184 of the Railway Labor Act lacks the foundation on which the Court, in Lincoln Mills, based its decision that federal law (even if it were necessary to fashion a body of federal law) governs the substance of collective bargaining agreements under the Labor Management Act.

It is also clear that Congress did not choose the direct course of providing that federal law, statutory or decisional, should control the substantive features of labor contracts in the airlines industry. Nothing in Section 184 indicates

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[5] Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A. § 185(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

any intention to affect the substance of collective bargaining agreements.[6] Section 184 of the Railway Labor Act relates solely to the procedure for settling disputes over the interpretation or application of the agreements. National policy, as expressed in the statute, requires that airlines and unions set up a procedure for settling grievances; [fol. 62] federal law governs certain questions integral to this settlement process,[7] but the statutory purpose does not require that the underlying contract rights and duties be brought under federal law, and no inference to that effect can be drawn from any language in the statute. There is therefore no statutory necessity for fashioning an imposing edifice of substantive federal law as the jurisdictional basis for the rights asserted in this suit. *Terminal Railroad Ass'n of St. Louis* v. *Brotherhood of Railroad Trainmen*, 1943, 318

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[6] Duplisea v. Maine Central Railroad, 1 Cir., 1960, 260 F. 2d 495, 496, was a suit against a railroad for wrongful discharge. In holding that there was no federal question jurisdiction, the Court said: "No doubt the Railway Labor Act is an 'Act of Congress regulating commerce' within the meaning of 28 U.S.C.A. § 1337. It would have been within the power of Congress to provide a federal cause of action for damages based upon a wrongful discharge of a railway employee in violation of the collective bargaining agreement. Cf. Textile Workers Union of America v. Lincoln Mills of Alabama, 1957, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972. If such a federal cause of action had been created, presumably the federal district court would have had jurisdiction, either under 28 U.S.C.A. § 1337, or under the more general provision of 28 U.S.C.A. § 1331, since more than $3,000 was involved. ¶ "But counsel for appellant was unable to point to any provision of the Railway Labor Act creating such federal cause of action. Nor have we been able to find any such provision. . . ." See also text to footnote 23.

[7] In Sigfred v. Pan American World Airways, 5 Cir., 1956, 230 F. 2d 13, 16-17, cert. denied, 351 U. S. 925, 76 S. Ct. 782, 100 L. Ed. 1455, this Court held that federal law governs the scope of judicial review of an award made by a system board of adjustment under § 184 of the Railway Labor Act, since the application of state law to this question would allow a freedom of review incompatible with the purpose of the statute to allow the parties to arbitrate their disputes with finality. In Sigfred, however, there was diversity of citizenship and enforceability of an award was not at issue.

U. S. 1, 63 S. Ct. 420, 87 L. Ed. 571;[8] *Hettenbaugh* v. *Airline Pilots Ass'n International*, 5 Cir., 1951, 189 F. 2d 319.[9]

[fol. 63] II.

The appellants, more narrowly than in the contention just discussed, argue that Section 184 providing for airline system boards of adjustment creates a federal right in the *enforcement of the award.*

On this point we consider our decision in *National Airlines* v. *Metcalf*, 5 Cir., 1959, 271 F. 2d 817 controlling. In Metcalf this Court faced substantially the same question at issue here, although, as the question was presented, the Court found it necessary to focus on the applicability of Section 153 (p)[10] to an award of a system board rather

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[8] In that case, 318 U. S. 1, Mr. Justice Jackson, organ of the court, stated:

"The Railway Labor Act . . . . does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce."

[9] In Hettenbaugh, 189 F. 2d 319, 320, this Court held:

"Likewise, the complaint does not state a federal question. To pose a federal question, there must be an allegation of a violation of some right granted by a federal statute or by the federal constitution. No violation of any such right is alleged. The most the complaint does in this case is to allege that the National Airlines was subject to the terms of the Railway Labor Act, and that the appellee had deliberately violated the obligation imposed on it by the act for the purpose of defeating the lawful objective sought to be obtained by said Act."

[10] 45 U.S.C.A. § 153 establishes the National Railroad Adjustment Board and provides a series of rules to govern its operation. Subsection (p) provides:

than on the federal question issue. This Court squarely held that in non-diversity cases an airline system board award is not enforceable in the federal courts under Section 184. In Metcalf, as in the instant case, an aggrieved employee sued to enforce an award of a system board established under Section 184 of the Railway Labor Act. The plaintiff contended that Section 153(p), establishing federal jurisdiction to enforce an award granted by the National Railway Labor Adjustment Board, applied to awards of an airline system board. This Court distinguished between awards of the National Railway Labor Adjustment Board and lower-status awards of an airline system board: the awards of an airline system board, unlike those of the Na- [fol. 64] tional Railway Adjustment Board, carry "no legislative determination as to their finality or as to their being a basis of federal suit jurisdiction".[11] Judge Tuttle, speaking for the Court, held: "[T]he legislative digest of Congress is clearly expressed. Such design is to grant to those winning arbitration awards the right to sue on them in federal courts only when and if the Mediation Board creates a

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"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States . . . a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board. . . ."

[11] In Metcalf, 271 F. 2d 817, 819, the Court stated:

"Congress made even more clear that it was not elevating to the same rank the status of an award by such *system* board in the airline industry as was granted to an award of the National Railway Labor Adjustment Board by then providing in Section 185 for the future creation of a similar National Board for the air industry when in the judgment of the National Mediation Board 'it shall be necessary to have a permanent national board of adjustment.' . . . All the provisions of the Railway Labor Act are adopted for the air industry except section 153; instead of giving similar relief to [§] 153, special provision is made for adjustment of labor disputes by system or regional boards with no legislative determination as to their finality or as to their being the basis of federal suit jurisdiction."

National Air Transport Adjustment Board whose award is ignored or not complied with by the carrier. Then only does Section 153(p) become operative in the air industry." 271 F. 2d 817, 820.

At appellants strongly urged request to take a fresh look at the jurisdictional issue notwithstanding Metcalf, we have examined the statute in its entirety.

As previously stated, the Act is bare of any provision for federal court enforcement of system board awards; and we have not found, nor have appellants pointed out, any provision carrying the implication that such enforcement was intended. See *Duplisea* v. *Maine Central Railroad*, 1 Cir., 1960, 260 F. 2d 495. The Union contends that Congress must have envisaged federal jurisdiction of system board [fol. 65] awards, since the provision for an adjustment proceeding is ineffectual if its results are not enforceable in the federal courts; Congress would not have established a system of half-way measures.[12] This argument loses its force when the statutory purpose is considered with reference to prevailing state law at the time of enactment. In 1936 courts in nearly all states treated a suit to enforce an agreement to arbitrate differently from a suit to enforce an arbitration award. Under common law an agreement to submit disputes to arbitration was revocable until an award was rendered, and would not prevent a suit on the contract.[13]

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[12] State courts would be required to recognize the validity of arbitration agreements established under the federal law. In Metcalf, 271 F. 2d 817, 820, this Court said:

> "The argument made by Appellant that the statute must be construed so as to give the District Court jurisdiction because otherwise he is without a remedy to enforce a federally enacted right is, of course, without foundation. The state courts have full and complete jurisdiction to grant relief on such an alleged contractual right. There is nothing unusual in the holding that the state courts apply the federal law just as do the federal courts if the cause is one as to which the federal law controls."

For a discussion of a state's constitutional obligation to enforce federally created rights see Comment, 73 Harv. L. Rev. 1551 (1960).

[13] See generally Sturges, Commercial Arbitration and Awards §§ 15, 18, 76-83 (1930); Wolaver, The Historical Background of Commercial Arbitration, 83 U. Pa. L. Rev. 132, 138-44 (1934).

Lakube v. *Cohen*, 304 Mass. 156, 23 N. E. 2d 144 (1939). Statutes enacted to make arbitration agreements enforceable generally were limited to agreements concerning existing disputes. Only the statutes patterned on the New York Draft Act extended enforceability to future-disputes agreements,[14] and some of these excluded arbitration agree- [fol. 66] ments in employment contracts. As late as 1950 a study revealed that,

> "there is a total of ten states in which future-disputes clauses appearing in collective bargaining agreements will be enforced. [Cal., Col., Conn., Del., La., Mass., N. J., N. Y., Pa., Wash.]. In the remainder of the states, and in the federal courts (with some minor variances) future-disputes clauses may be disregarded with impunity." Gregory and Orlikoff, The Enforcement of Labor Arbitration Agreements, 17 U. Chi. L. Rev. 233, 241-42 (1950).

Statutes validating future-disputes clauses did not cover the full range of labor disputes: generally they were limited to disputes which could be the subject of an action at law or equity in a civil proceeding. Gregory and Orlikoff, *supra* at 242. On the other hand, the judicial approach in state courts *after* arbitration has already taken place has almost invariably shown a healthy respect for enforcement of an award. Even at common law an award was valid and binding on the parties. Enforcement could be obtained by an action at law upon the award itself. *Fuerst* v. *Eichberger*, 224 Ala. 31, 138 So. 409 (1931). The award winner could sue in equity for specific performance. *United Fuel Gas Co.* v. *Columbian Fuel Corporation*, 4 Cir., 1948, 165 F. 2d 746. Or the award could be pleaded to bar action on

[14] "The New York Arbitration Law (1920) was the first American statute to expressly embrace agreements to arbitrate future disputes. . . . The Draft Act, advocated by the American Arbitration Association, which is the basis of arbitration statutes in twelve states and of the United States Arbitration Act, 43 Stat. 883-886 (1925), 9 U.S.C.A. §§ 1-15 (1934), is patterned after the New York Arbitration Law." 26 Va. L. Rev. 327. See generally Simpson, Specific Performance of Arbitration Contracts, 83 U. Pa. L. Rev. 161 (1934).

the original claim by the award loser. *Rhodes* v. *Folmar*, 208 Ala. 595, 94 So. 745 (1922). Numerous state statutes [fol. 67] were designed to facilitate enforcement of awards. "In many jurisdictions the award, when filed in court, could automatically be made the basis of a judgment; in others, of a motion to confirm, after which judgment would be entered." Phillips, Rules of Law or Laissez-Faire in Commercial Arbitration, 47 Harv. L. Rev. 590, 592 (1934). See Sturges, Commercial Arbitration and Awards, §§ 308-59 (1930). These statutes varied greatly in their coverage and their procedural requirements and courts in different states varied greatly in the extent of the review which they gave to arbitration awards, but, broadly speaking, state courts could be relied on to give effect to an arbitration award, in contrast with their unwillingness to enforce executory submission agreements. In the light of this historical context it cannot be said that a federal law imposing a requirement of compulsory arbitration but not providing for federal court enforcement of the arbitration award is a halfway measure.

The purpose of the Railway Labor Act is to provide prompt and orderly settlement of labor controversies in order to avoid disruption of the national transportation system by requiring arbitration of disputes.[15] Agreements to arbitrate in the airline industry were all voluntary before the 1936 Act, and the lack of enforceability undoubtedly reduced the incentive to contract for arbitration. Thus, even without any federal enforcement in non-diversity [fol. 68] cases, the statute accomplished a major national objective in requiring an arbitration agreement in every airline employment contract. Construing the Act as not in itself furnishing an independent basis of jurisdiction for enforcement of awards does not mean that there would be

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[15] 45 U.S.C.A. § 151 (a) outlines the general purposes of the Railway Labor Act as follows:

> "The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein . . . (5) to provide prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

no compliance with the arbitration agreements. There would often be voluntary compliance, of course, and there would be legal enforcement of the agreements in actions brought in state courts and in diversity actions in federal courts.

There are various reasons why Congress might have preferred to limit federal regulation to the requirement of arbitration rather than include enforcement of the award. Congress might have considered it more appropriate to leave this function to the state courts, because the contract questions involved would be governed by state law. Congress might not have wished to impose additional burdens on the federal district courts. In the ten years following the enactment of the Railway Labor Act in 1926 the states had become more receptive to arbitration; it is a fair inference that Congress might have concluded that federal enforcement of the arbitration awards was unnecessary. Whatever the motivation, the 1936 amendment extending the Railway Labor Act to the airline industry does not go as far in establishing federal control over the settlement process as the original Act, under which the adjustment proceeding itself is conducted by government officials with a national board of adjustment. This difference in congressional treatment of the railroad industry as against the airline industry, and between these industries and other industries, cannot be ignored.

We are not asked to decide whether Congress provided [fol. 69] substantive rights enforceable by a court of competent jurisdiction. The question is simply whether federal district courts are to enforce airline arbitration awards in non-diversity actions. Such enforcement is not necessary to accomplish the purpose of the statute. Federal district courts are courts of limited jurisdiction.[16] On the tenuous basis suggested here, we do not feel free to hold that the Act impliedly provides federal enforcement of an airline system board award as an independent basis for district court jurisdiction.

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[16] Chicot County Drainage District v. Baxter State Bank, 1940, 308 U. S. 371, 60 S. Ct. 317, 84 L. Ed. 329; Gillis v. California, 1934, 293 U. S. 62, 55 S. Ct. 4, 79 L. Ed. 199; Neirbo Company v. Bethlehem Shipbuilding Corporation, 1939, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167.

III.

The decisions dealing with federal question jurisdiction cannot easily be harmonized.[17] There is general agreement, however, on one principle: an action does not arise under federal law, for purposes of Sections 1331 and 1337 of the Judicial Code, unless the complaint, without benefit of the answer, discloses affirmatively a federally-created cause [fol. 70] of action.[18] A mere reference to a federal act and an assertion that Section 1331 applies are not sufficient to show that the case arises under federal law.[19] This is not a matter of the sufficiency of pleadings under Rule 8, FRCP, but a matter of the plaintiff being able to demonstrate at the start of litigation that he is entitled to have a federal

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[17] In general, see Willard, When Does a Case "Arise" under Federal Laws? 45 Am. L. Rev. 373 (1911); Chadbourn and Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639 (1942); Forrester, The Nature of a Federal Question, 17 Tulane L. Rev. 363 (1942); Federal Question Jurisdiction and Section 5, 18 id. 263, (1943); Bergman, Reappraisal of Federal Question Jurisdiction, 46 Mich. L. Rev. 17 (1946); Fraser, Some Problems in Federal Question Jurisdiction, 49 Mich. L. Rev. 73 (1950); Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157 (1953); London, "Federal Question" Jurisdiction, — A Snare and a Delusion, 57 Mich. L. Rev. 834 (1959); Hart and Wechsler, Federal Courts and the Federal System (1953), esp. 763-769. See also notes, Necessity that Federal Question Appear in the Complaint, 8 Wash. & Lee L. Rev. 89 (1951); 3 Vand. L. Rev. 320 (1950).

[18] Metcalf v. Watertown, 1888, 128 U. S. 586, 9 S. Ct. 173, 32 L. Ed. 543; Tennessee v. Union Planters Bank, 1894, 152 U. S. 454, 14 S. Ct. 654, 38 L. Ed. 511; Louisville & Nashville R. Co. v. Mottley, 1908, 211 U. S. 149, 29 S. Ct. 42, 53 L. Ed. 126. In each of these cases the court's decision turned on whether the plaintiff's right was created by state law or by federal law, even though the outcome would depend on the determination of a federal question. See London, Federal Question Jurisdiction 57 Mich. L. Rev. 835, 848 (1959).

[19] Doby v. Brown, 4 Cir., 1956, 232 F. 2d 504, cert. den. 352 U. S. 837, 77 S. Ct. 57, 1 L. Ed. 2d 55; Beistline v. City of San Diego, 9 Cir., 1958, 256 F. 2d 421, cert. den. 358 U. S. 865, 79 S. Ct. 96, 3 L. Ed. 2d 98. See also Gully v. First National Bank in Meridian, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 70.

court hear his case."[20] Here the complaint fails to show an "arising under" claim. Amended pleading could not cure the defect.

The right asserted by the plaintiffs is a creature of contract, not a creature of a federal law. A reading of the complaint shows a claim originating in contract and based on violation of a contract. The system board of adjustment was established by private contract. The grievances pre- [fol. 71] sented alleged violations of contract, not violations of the Railway Labor Act. The grievants followed the grievance procedure stipulated in the contract. The board, established by contract to settle grievances, purportedly acted under authority as defined in the contract. The board rendered an award for violation of the contract, not for violation of the Railway Labor Act. This award rests on the board's interpretation of the contract. When it came to filing suit, the individual plaintiffs did not sue for wrongful discharge under the Act but for enforcement of the arbitration award. Properly enough, they did not allege in their complaint that the award was within the Board's jurisdiction or that the defendant denied the authority and jurisdiction of the board to make the award; assertion of the board's jurisdiction to make the award is not an essential part of such claim. To make out a cause of action, *sustainable by a court of competent jurisdiction*, it was necessary for the plaintiffs to show only the contract (here attached to the complaint), the alleged violation of the contract, the submission of the dispute to the board in accordance with the contract, and the award in their favor. The

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[20] Chief Justice Marshall's dictum in Osborn v. United States, 1824, 9 Wheat, 738, 823, 6 L. Ed. 204, still stands: "The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought." "Since the federal courts are courts of limited jurisdiction it is natural that their jurisdiction be made to appear at the time it is invoked. This means that in the case of an action commenced in the federal court and hence invoking its original jurisdiction the natural and logical principle requires the federal question to appear in the complaint, well pleaded, and without anticipation of defenses." Moore's Commentary on the Judicial Code, ¶ 0.03 (22), p. 143 (1949).

"obligation of the contract being a creation of the state" and the "suit being built upon a contract", there "is no necessary connection between the enforcement of such a contract according to its terms and the existence of a controversy arising under federal law".[21]

A federal question can come into this case only by way of the plaintiffs' assuming that the defendant, as a defensive matter, will attack the authority and jurisdiction of the board; that such defense will require a construction [fol. 72] of the Railway Labor Act, especially since the contract defines the board's jurisdiction in language that parallels Section 153 (i) of the Act.[22] It is established beyond dispute, however, that where a federal question comes into a case only as a part of the defense, federal jurisdiction does not exist under Section 1331 and 1337. In a leading decision denying jurisdiction in a similar situation the Supreme Court summarized the principle as follows:

> "Ever since Metcalf v. City of Watertown, 128 U. S. 586, 589, it has been settled doctrine that where a suit is brought in the federal courts 'upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear at the outset, from the declaration or the bill of the party suing, that the suit is of that character.' But 'a suggestion of one party that the other will or may set up a claim under the Constitution or laws of the United States does not make the suit one arising under the Constitution or those laws.' State of Tennessee v.

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[21] Gully v. First National Bank in Meridian, 1936, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 70.

[22] The collective bargaining agreement provides:

> "(e) The Board shall have jurisdiction over disputes between any employee covered by the Mechanics' Agreement and the Company, growing out of grievances or out of interpretation or application of any of the terms of the Mechanics' Agreement. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation, or working conditions covered by existing agreements between the parties hereto."

For language of Section 153 (i), see footnote 2.

Union & Planters' Bank, 152 U. S. 454, 464. The plaintiff's claim itself must present a federal question 'unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.' Skelley Oil v. Phillips Petroleum Co., 1950, [fol. 73] 339 U. S. 667, 672, 70 S. Ct. 876, 879, 94 L. Ed. 1194, 1200.

Since it is not part of the plaintiff's case to establish that the board acted within its jurisdiction, the instant case falls squarely within this rule.

IV.

It is not enough that in the background a federal law compelled the parties to enter into the contract. "A suit", said Mr. Justice Holmes, "arises under the law that creates the cause of action"; the fact that justification for an alleged wrong may depend upon the federal patent law is no more material to the question under what law the suit is brought than it would be in an action of contract." *American Well Works* v. *Layne & Bowler Co.*, 1916, 241 U. S. 257, 36 S. Ct. 585, 60 L. Ed. 987. If a cause of action is state-created, federal jurisdiction cannot be predicated on the fact that the outcome of the case may turn on an incidental federal question. It is the suit, "not a question in the suit, that must arise under the laws of the United States." Mr. Justice Holmes, dissenting in *Smith* v. *Kansas*, 1921, 255 U. S. 180, 41 S. Ct. 243, 65 L. Ed. 577. The Supreme Court adopted the Holmes test in two later leading cases.[23]

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[23] McGoon v. Northern Pacific Railway Co., D.C.N.D., 1913, 204 F. 2d 998, a case often cited, states the rule: "[T]he following is a correct affirmative rule: Whenever federal law grants a right of property or of action, and a suit is brought to enforce that right, such a suit arises under the law creating the right, within the meaning of statutes defining the jurisdiction of federal courts. . . . What, then, do the courts mean when they say that the construction of federal law must be involved in order to confer this jurisdiction? Certainly not that the case will necessarily turn upon an interpretation of the statute, but simply that the complaint must set forth a cause of action of which federal law is an essential ingredient, and which may, therefore properly involve a construction of that law."

[fol. 74] In *Puerto Rico* v. *Russell & Company*, 1933, 288 U. S. 476, 483, 53 S. Ct. 447, 449-50, 77 L. Ed. 903, 909, the Court couched the principle in straight Holmesian language. Again, Mr. Justice Cardozo said, in *Gully* v. *First National Bank in Meridian*, 1936, 229 U. S. 109, 111, 57 S. Ct. 96, 81 L. Ed. 70: "Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive." If we look far enough "countless claims of right can be discovered to have had their source or their operative limits in the provisions of a federal statute", but it is "the federal nature of the right to be established that is decisive". "To bring a case within [Section 1331], a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." It might be said that here the Railway Labor Act was an ingredient of the plaintiffs' claim, since the adjustment procedure was a result of the Act, but the Act simply provided the impetus for the contract creating the right of action.

This Court applied these principles in *Amalgamated Association of Street Electric Railway and Motor Company Employees* v. *Southern Bus Lines*, 5 Cir., 1951, 189 F. 2d 219, 221, a non-diversity action by a union to compel an employer to arbitrate proposed changes in a contract of employment. The Union contended that the suit arose under the United States Arbitration Act, just as the appellants here rely on the Railway Labor Act. This Court stated:

> [fol. 75] "Upon the allegations of the complaint, we think it clear that the court below did not have jurisdiction over this controversy. No facts are alleged upon which the conclusion can legitimately be based that the District Court independently of the arbitration agreement would have jurisdiction of the 'subject matter of a suit arising out of the controversy between the parties' as required by Section 4 of the Federal Administration Act, 9 U. S. C. A., par. 4 . . . Viewing

> the case at bar against this background of established principle, we do not find in it the elements of federal jurisdiction. What is here involved is merely a controversy between the parties as to the construction of a contract which allegedly arises out of the laws of the United States respecting collective bargains between employer and employees in interstate commerce; but the right of action asserted does not arise out of those laws but only arises from the subsequent contractual relations of the parties. The wrongful breach of such relations does not confer federal court jurisdiction unless there is diverse citizenship."[24]

Duplisea v. *Maine Central Railroad*, 1 Cir. 1960, 260 F. 2d 495, was an action under the Railway Labor Act against a railroad for alleged wrongful discharge of the [fol. 76] plaintiff.[25] In affirming an order of dismissal for lack of jurisdiction, the Court said:

> "The complaint is conveniently vague as to the basis of federal jurisdiction. . . . Nor is there any allegation of a breach of a duty imposed or the violation of a right given by the Constitution, the Railway Labor Act, or any other federal statute. . . . Nor does the complaint raise any question as to the validity, construction, or effect of the Constitution or of any law of the United States. On the contrary, under the terms of the complaint, plaintiff seeks damages for an alleged wrongful discharge in violation of the terms of a collective bargaining agreement negotiated by the Railroad and the Brotherhood of Railroad Trainmen under the provisions of the Railway Labor Act."

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[24] For other cases holding that the Arbitration Act does not furnish an independent basis for jurisdiction, see Amalgamated Association v. Southern Bus Lines, 5 Cir., 1951, 189 F. 2d 219; Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc., 2 Cir., 1933, 62 F. 2d 1004; In re Woerner, 2 Cir., 1929, 31 F. 2d 283; Mengel Co. v. Nashville Paper Products and Specialty Workers Union, 6 Cir., 1955, 221 F. 2d 644.

[25] See footnote 6 for an additional quotation from this opinion.

See also *Hayes* v. *Union Pac. R. Co., et al.*, 9 Cir., 1950, 184 F. 2d 337[26] and *Shipley* v. *Pittsburgh & L. E. R. Co.*, [fol. 77] 1947, D. C. Pa., 70 F. Supp. 870.[27]

Appellants rely on *Peyton* v. *Railway Express Agency*, 1942, 316 U. S. 350, 62 S. Ct. 1171, 86 L. Ed. 1525 and *Crispin Company* v. *Lykes Brothers Steamship Company*, 1955, 134 F. Supp. 704. We consider these cases inapplicable.

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[26] Hayes v. Union Pac. R. Co., et al., 9 Cir., 1950, 184 F. 2d 337, involved the question whether the district court had jurisdiction under the Railway Labor Act of an employee's complaint charging racial discrimination in the performance of a collective bargaining agreement. The Court held that there was no federal question:

> "[I]t is clear to us that the Federal Courts are not charged by federal law with the duty or function of policing the parties in the performance of collective bargaining agreement entered into pursuant to the Railway Labor Act. Congress did not, by the Railway Labor Act, grant jurisdiction to the Federal Courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate tribunals have been established for that purpose. 45 U. S. C. A. § 153; National Railroad Adjustment Board; Slocum v. D. L. & W. R. Co., 339 U. S. 239, 70 S. Ct. 577. It is only when collective bargaining agreements are unlawfully entered into or when the agreements themselves are unlawful in terms or effect, that federal courts may act. This is made quite clear by the Supreme Court in Steele v. L. & N. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173 and Turnstall v. Brotherhood, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187. . . ."

[27] In Shipley v. Pittsburgh & L. E. R. Co., 1947, D. C. Pa., 70 F. Supp. 870, twenty railroad employees sued to recover extra compensation under a contract authorizing extra pay for performance of special duty. The court, in holding that the Railway Labor Act did not confer "arising under" federal jurisdiction, said:

> "[T]he present suit is based on the provisions of a private contract entered into between the bargaining agent of the plaintiffs and the defendant company. The obligation of the contract is a creation of the state . . . Nothing in the present suit involves the validity, construction or effect of the Railway Labor Act upon which the result of this action depends. Although the parties to this proceeding were governed by the act, the right of action, if one exists, is based on the alleged breach of a contract which it is alleged should be considered a part of the contract; the cause of action does not arise under the Railway Labor Act but only from the consequent contractual relations of the parties."

Peyton was an action under the Carmack Act against a common carrier for items lost or damaged in interstate shipment. Crispin arose under the Carriage of Goods by Sea Act. Both statutes regulate in great detail the substantive obligations of the shipper-carrier relation. As the court said in Crispin: "[T]he only duty which the defendant owes plaintiffs springs from the shipper-carrier relation . . . [W]hether the complaint sounds in tort or in contract, the obligations, responsibilities and liabilities which result from the shipper-carrier relation are circumscribed by the terms of the statute." That is not the case here. The Railway Labor Act leaves to the parties the right to decide their obligations, responsibilities, and liabilities. The only [fol. 78] statutory limitation is the requirement of a provision in the contract for arbitration and even this provides only that the board's jurisdiction shall not exceed the jurisdiction authorized under Section 153. This suit is nothing more than a state-created action to construe a contract.

It may seem ironical that of all the large industries engaged in interstate commerce only in the airline industry are parties to a collective bargaining agreement denied access to federal courts in non-diversity cases for the purpose of enforcing arbitration awards. If any industry should have ready access to federal courts because of the interstate character of its business, it is the airline industry. The answer we must discipline ourselves to give, however, is that federal district court jurisdiction is created only when Congress has provided for it; if the legislative pattern creates an anomaly, it is not for the courts to override the statutory dictates.[28] Here, jurisdiction lies with the state courts of Tarrant County, Texas.

Judgment is

AFFIRMED.

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[28] Irregularity in the legislative pattern is unfortunate, but it is not surprising in view of the fact that laws affecting similar problems in related areas may be enacted at different times and by different legislators. This is a case in point. The Railway Labor Act was enacted in 1926. The amendment of the Railway Labor Act extending most of its provisions to the airlines industry was passed in 1936. And the Labor Management Relations Act, which contains Section 301 relied on in Lincoln Mills, was enacted in 1947.

[fol. 79] Brown, Circuit Judge, Dissenting:

It is a paradox that the strength of the Court's opinion is that the result does not make sense. Of course the Court is not quite that harsh in its characterization of the result, but after spending pages demonstrating why Congress must have looked to the varying attitudes of 48 states for the enforcement of industrial arbitral decisions thought necessary to secure continuity to interstate air commerce, the Court puts it no less plainly in this euphemism: "If any industry should have ready access to federal courts because of the interstate character of its business, it is the airline industry." —F. 2d—, —.

The strength is derived from the inescapable historical fact that Congress also errs, and that if, as a consequence, the legislative machinery thus established is not adequate, the deficiency cannot be supplied by the Judiciary. But we ought to be very certain that the result is both inescapable and may not be bridged over by legitimate statutory interpretation within the traditional competence of the courts.

Of course my disagreement with this opinion carries with it a like difference with our earlier one in *Metcalf* v. *National Airlines, Inc.*, 5 Cir., 1959, 271 F. 2d 817.[29] The thesis of that case, echoed here, is that Congress deliberately chose to have the federal right vindicated in state courts.[30] That highlights this curious result. Under this [fol. 80] case, *Metcalf*, and more directly under *Sigfred*,[31] the law to be applied by the tribunal is federal law. This presupposes that the right is of federal origin—here spe-

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[29] As the briefs in that case reflect, all — the parties and this Court — were preoccupied with the jurisdictional amount of $3,000 under 28 USCA § 1331. No mention was made of § 1337.

[30] See footnote 12, supra. In these words we recognized that it was a federal right subject to federal principles: "There is nothing unusual in the holding that the state courts apply the federal law just as do the federal courts if the cause is one as to which the federal law controls." 271 F. 2d 817, 820.

[31] Sigfred v. Pan American World Airways, 5 Cir., 1956, 230 F. 2d 13, 16-17, cert. denied, 351 U. S. 925, 76 S. Ct. 782, 100 L. Ed. 1455, discussed in note 7, supra.

cifically under 45 USCA §§ 181-188. Yet our present opinion proceeds on the assumption that the *contract* is a creature of state law. I am unable to comprehend how a contract compelled by federal law and to be interpreted by courts under federal law principles may realistically be characterized as a creation of the state, so that a suit to enforce it is not one "arising under" federal law.

Air carriers and their employees are compelled to provide for industrial arbitration through System Boards of Adjustment. That was a recognition that serious disputes involving the most troublesome problems of constitutional law, due process and the like were being committed to tribunals made up of airplane pilots, aircraft engineers, mechanics and similar employees wholly untrained in the law or the business of judging. Moreover, it contemplated decision by boards made up of partisans with a neutral chairman only if needed to prevent an impasse.[32]
[fol. 81] If there is anything clear in this legislative muddle, it is this: Congress in 1936 could not seriously have thought that stability and continuity to interstate air commerce would come from the undulating policies and fre-

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[32] The Court apparently sees some basis for congressional distinction between system, group or regional boards of adjustment under § 184 pending establishment of a National Air Transport Adjustment Board under § 185 and those of § 153 on the ground that the National Railroad Adjustment Board is a governmental tribunal. The Court says: "Whatever the motivation, the 1936 Amendment extending the Railway Labor Act to the airline industry does not go as far in establishing federal control over the settlement process as the original Act, under which the *adjustment proceeding itself is conducted by government officials with a national board of adjustment.* This difference in congressional treatment of the railroad industry as against the airline industry, and between these industries and other industries, cannot be ignored." —— F. 2d ——, ——. (emphasis added)

Of course this is erroneous. The Railroad Adjustment Board and its four Divisions are each made up of partisan appointees of labor and management. Government enters the picture only through the designation of a neutral umpire and the payment of his compensation by the National Mediation Board. See 45 USCA § 153 (g) (n) (k) (1). The National Mediation Board does, of course, bear the burden of compensation paid to certain staff clerks and assistants of the Adjustment Board. 45 USCA § 153 (t).

quently demonstrated hostilities of the legislatures and courts (or both) of 48 states in the enforcement of anything thought so essential to industrial peace as this system of governmentally compelled arbitration. Indeed, §§ 181-188 expressly include by reference §§ 157-159. These actions of the Railway Labor Act provide for arbitration over and beyond action before the Adjustment Board or the Mediation Board. These sections make the decision of the Board of Arbitration reviewable and enforceable solely in the United States District Courts. 45 USCA § 157, § 158 (k) (1), § 159, First, Second.

Whether for an airlines labor controversy the submission to and processing by a § 184 System Board of Adjustment constitutes such a § 157 "arbitration," I need not decide. What is plain is that any such § 157 arbitration is the substantial equivalent of the arbitration award discussed at great length in Part II of the Court's opinion. There the Court develops the thesis that Congress was optimistic that whereas state courts would be hostile to executory contracts *to* arbitrate, they would give cordial, effectual wel- [fol. 82] come to completed arbitration awards.[33] Here § 157 is proof, however, that where the decision partakes of an agreed contractual arbitration which has proceeded through decision, Congress recognized that the proper, and only proper, tribunal for review and enforcement was the federal system.

The result becomes even more incongruous if it is assumed that an arbitration decision of an airways System Board of Adjustment made pursuant to a collective bargaining contract under compulsion of § 184 is not a § 159 arbitration. According to this Court, "jurisdiction" of a suit for the enforcement of a System Board of Adjustment award "lies with state courts of Tarrant County, Texas." —F. 2d —, —. If, as to this very controversy, the parties would have prepared an agreement of arbitration under § 157, it is expressly required that review and enforcement be solely in the local United States District Court. If Congress, with its rather rich experience in the jealous

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[33] See notes 12 through 15 and related text. —— F. 2d ——, ——.

hostility of the Judiciary to lay arbitration[34] was content with state tribunals as the sole effective means of endorsement of the compulsorily required contractual arbitration, it is strange indeed that it prescribed the federal route as to § 157 arbitration.

I do not mean to overemphasize § 157 as a technically precise investment of federal jurisdiction. We are searching for probable congressional intent. In that quest it points the way that Congress surely thought that for interstate air commerce it was essential that one system, and only one [fol. 83] system, should undertake to police and enforce labor relations between air carriers and their employees. It must be remembered that the airline Labor Act was a complete departure from the existing structure. Whereas the National Labor Relations Board had only the power to protect bargaining in good faith, the airline Labor Act brought into play the National Mediation Board (§ 183) for the solution of "major" disputes—those on which the parties had not made a contract.[35]

It is inconceivable to me that with respect to contracts induced by the operation of the National Mediation Board under § 183 and the incorporation of §§ 151-152 and §§ 154-156, Congress at the same time meant for enforcement of arbitration decisions under such contracts to be committed to the unknown, unpredictable and uncontrollable attitudes of 48 states. Not the least of the absurdities is that an airplane flies from state to state. What state is to be the forum?[36] What state was the parent of this crea-

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[34] See United States Arbitration Act, 9 USCA §§ 1-14 (1925).

[35] Elgin, Joliet & Eastern R. Co. v. Burley, 1945, 325 U. S. 711, 722-728, 65 S. Ct. 1282, 89 L. Ed. 1886; Brotherhood of Railroad Trainmen v. New York Central R. Co., 6 Cir., 1957, 246 F. 2d 114, cert. denied, 355 U. S. 877, 78 S. Ct. 140, 2 L. Ed. 2d 107; Norfolk & P.B.L. R. Co. v. Brotherhood of Railroad Trainmen, 4 Cir., 1957, 248 F. 2d 34, cert. denied, 355 U. S. 914, 78 S. Ct. 343, 2 L. Ed. 2d 274.

[36] The selection of the state is only the beginning. What local law of the local state applies? For example, in Texas is it the Arbitration Act, TEX. CIV. STAT. arts. 224-238 (Vernon 1959), or the special one covering labor controversies in arts. 239-249, or the case-made law? See 6 Tex. Jur. 2d Arbitration and Award §§ 54-57 (1959).

ture—the consensual contract containing the agreement to arbitrate? May any or all of the states beneath the route or routes traveled by the airline be resorted to? Is the continuity of essential air traffic to be at the plaintiff's choice of forum? What is to happen when several plaintiffs bring [fol. 84] several suits in several states? Is effective federal control of an operational activity deemed so essential to national welfare to be precariously dependent upon the accident of diversity of citizenship?

Of course this Court does not shirk the obvious answers to these queries. It avoids them as ironical proof either of congressional aberration, of indecision or, more questionable, a conscious choice of turning it all back to 48 states. And under some ascetical discipline demonstrating real judicial restraint because the result is so obviously unsound, it despairs that with the signs all pointing one way, a barricade was somehow left across the road.

Just as *Lincoln Mills* cut through similar logical considerations to effectuate a clearly revealed policy, so here industrial arbitration compelled under §§ 181-188 is so much a part of the legislative machinery to protect the free flow of interstate air commerce that effectual enforcement of an award is realistically the assertion of a claim arising under a law regulating commerce.

I therefore respectfully dissent.

[fol. 85]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18286

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, R. K. DOUD, S. V. CORNSTUBBLE, O. L. BROOM, C. R. CASEY, P. R. DAVIS and E. E. FUQUA,

versus

CENTRAL AIRLINES, INC.

JUDGMENT—October 13, 1961

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, International Association of Machinists, AFL-CIO, R. K. Doud, S. V. Cornstubble, O. L. Broom, C. R. Casey, P. R. Davis and E. E. Fuqua, and the surety on the appeal bond herein, Ray E. Cotnoir, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Brown, Circuit Judge dissenting.

[fol. 88] Order Staying Mandate—November 14, 1961 (omitted in printing).

[fol. 89] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 90]

SUPREME COURT OF THE UNITED STATES

No. 656, October Term, 1961

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, et al.,
Petitioners,

vs.

CENTRAL AIRLINES, INC.

ORDER ALLOWING CERTIORARI—February 26, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.